United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1258

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent;

CELANESE CORPORATION, ET AL.,

Intervenors.

On Petition For Review Of Action Of The
Administrator Of The Environmental
Protection Agency

BRIEF FOR INTERVENORS

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Preliminary Statement

This is an action in which Petitioner seeks review in this Court of the following Effluent Limitations Guidelines issued by the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act Amendments of 1972:

(a) Part 412, Feedlots Point Source Category, 39 Fed. Reg. 5703 (February 14, 1974);

(b) Part 426, Glass Manufacturing Point Source Category, 39 Fed. Reg. 5711 (February 14, 1974);

(c) Part 422, Phosphate Manufacturing Point Source Category, 39 Fed. Reg. 6579 (February 20, 1974);

(d) Part 411, Cement Manufacturing Point Source Category, 39 Fed. Reg. 6589 (February 20, 1974);

(e) Part 428, Rubber Processing Point Source Category, 39 Fed. Reg. 6660 (February 21, 1974);

(f) Part 424, Ferroalloy Manufacturing Point Source Category, 39 Fed. Reg. 6805 (February 22, 1974);

(g) Part 427, Asbestos Manufacturing Point Source Category, 39 Fed. Reg. 7525 (February 26, 1974);

(h) Part 432, Meat Products Point Source Category, 39 Fed. Reg. 7893 (February 28, 1974);

(i) Part 421, Nonferrous Metals Manufacturing Point Source Category, 39 Fed. Reg. 12821 (April 18, 1974).

Intervenors are chemical companies whose interests will be affected by the outcome of this litigation. The motion for leave to intervene was filed on March 25, 1974 and granted on March 28, 1974.

Petitioner has limited its petition for review to "identical portions of related regulations of the Environmental Protection Agency which provide that the Administrator of the Environmental Protection Agency has power to grant exceptions to the effluent limitation guidelines promulgated under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq., on an

individual plant by plant basis." (Amended Petn., at 1.) Intervenors also seek review of these provisions, but only if this Court finds, contrary to Intervenors' contentions, that it has jurisdiction over this review action.

Questions Presented

1. Does this Court have jurisdiction to review, on a petition for review, regulations issued by EPA under Section 304(b) of the Federal Water Pollution Control Act?

2. Can EPA change the statutory pattern of review by denominating the "guideline" regulations under Section 304(b) "definitional" only and by claiming that the regulations it has issued are in fact "limitations" under Section 301 with the asserted consequence that regulations under Section 304(b) are reviewable only in the Court of Appeals?

3. Is EPA authorized by the statute to issue effluent limitations regulations under Section 301?

4. Has EPA complied with the Administrative Procedure Act when it only now asserts that regulations it proposed under Section 304(b) were in fact issued also as limitations under Section 301?

5. Do the regulations issued by EPA comply with the requirements of Section 304(b)?

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under Section 509(b) of the Federal Water Pollution Control Act, as amended, particularly by the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), 33 U.S.C. §1369(b). Intervenors contend that this Court does not have jurisdiction to review these regulations, but rather that the review should be in the District Court under the Administrative Procedure Act, 5 U.S.C. §§701-706, and under jurisdictional provisions of the Judicial Code, 28 U.S.C. §§1331, 1332, 1337, 1361 and 1651.

Statutes and Regulations Involved

Sections 301, 302, 304, 306, 307, 309, 505, and 509 of the Act as amended by the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §§1311, 1312, 1314, 1316, 1317, 1319, 1365, and 1369) are set out in Appendix A, infra.

The regulations promulgated by EPA which are at issue in this proceeding are cited in the table found in the Preliminary Statement, supra at pp. 1-2.

Background and Statutory Framework

The issues raised by Intervenors are basically questions of statutory interpretation. The following brief summary of the statutory plan is provided to place in perspective the questions discussed in this brief.

In 1972 the Congress completely revised the then-existing Federal Water Pollution Control Act by enacting the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816, 33 U.S.C. §§1251, et seq. The Act as extensively revised constitutes the organic statute under which all effluent discharges from industrial plants and municipalities are regulated.

The structure of the Act is based on a general prohibition of discharges except as they are permitted under the law. (§301, 33 U.S.C. §1311.) Permits for effluent discharges are issued under Section 402 of the Act, 33 U.S.C. §1342, and the limits and conditions which restrict the discharge of an individual industrial plant are fixed in the permit after proceedings conducted under Section 402. Unless a plant has a permit, no effluent discharges are lawful. The statute provides, however, that if a permit application is pending but no dispositive action on this application has been taken, effluent discharges are allowed until December 31, 1974 (§402(k), 33 U.S.C. §1342(k)).

The permit procedure is based on the congressional policy that the primary responsibility for water quality protection shall be given to the States. (§101(b), 33 U.S.C. §1251(b).) EPA is required to turn the permit granting authority over to the States when State programs meet the requirements of the Act. (See §402(b)-(f), 33 U.S.C. §1342(b)-(f).) As of May 30, 1974, ten (10) States

had qualified and now administer the permit program in their area.[1/]

Central to the regulatory framework in which the permit system operates are the regulations providing guidelines for effluent limitations under Section 304(b) of the Act, 33 U.S.C. §1314(b).[2/]

1/ EPA has failed to publish in the Federal Register any notice, timely or not, of its approval of State permit programs, and EPA has never published a comprehensive list of States whose permit programs have qualified. On May 30, 1974, an EPA official stated verbally that as of that date the following States had approved programs for permit issuance, thus displacing EPA direct permit authority in their geographic area:

STATE	DATE OF APPROVAL
California	May 14, 1973
Oregon	September 26, 1973
Connecticut	September 26, 1973
Michigan	October 17, 1973
Washington	November 14, 1973
Wisconsin	February 4, 1974
Ohio	March 11, 1974
Vermont	March 11, 1974
Delaware	April 1, 1974
Mississippi	May 1, 1974

Other States have formally applied for approval.

2/ This proceeding relates to effluent guidelines applicable to existing plants. Other sections of the statute and of the regulations deal with standards applicable to new sources (§306, 33 U.S.C. §1316) or pretreatment of wastes before they may be discharged into a public sewer system (§307, 33 U.S.C. §1317), or provide a statutory procedure for issuing effluent limitations based on water quality standards (§302, 33 U.S.C. §1312).

Notably, Section 302 establishes an explicit procedure for setting "water quality"-related "effluent limitations" directly by the Administrator; moreover, it provides a procedure by which the limitations are to be set on a case-by-case basis for individual point sources (plant discharges). The relevance of Section 302's provisions to this action are discussed in detail, infra, at 32-40.

Such regulations are at issue in this review proceeding. To understand the purpose of these regulations, it is necessary first to refer to the objectives to be achieved as outlined in Section 301, 33 U.S.C. §1311. Section 301 identifies the objectives in terms of time and technological standards:

(1) By 1977 the effluent limitations shall require application of "best practicable control technology currently available."

(2) By 1983 the level is "best available technology economically achievable" (including elimination of discharges if found to be "technologically and economically achievable").

The regulations under Section 304(b) provide the key for achievement of both the 1977 and the 1983 objectives. Section 301 provides that these technological objectives ("effluent limitations," in the language of Section 301) shall be defined and determined[1/] in accordance with regulations under Section 304(b).

The regulations under Section 304(b) are the foundations of

1/ The statute uses the term "defined" in Section 304(b)(1)(A) in providing for achievement of the 1977 objectives, and the term "determined" in Section 304(b)(2)(A) in providing for achievement of the 1983 objectives.

the permit program.[1/] Congress recognized the large number of industrial plants which are sources of water pollution and the enormous diversity of these plants and their products and processes which would have to be dealt with in the permit program.

To achieve the statutory objective, Congress provided that Section 304(b) regulations have two essential elements. First, the regulations "shall" identify the degree of effluent reduction attainable by 1977 through the application of best practicable control technology currently available for classes and categories of point sources. (§304(b)(1)(A).) Second, the statute directs that the regulations "shall . . . specify factors to be taken into account in determining control measures and practices to be applicable

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1/ This regulatory pattern in the statute is confirmed by the legislative history of the Act. Thus, the Senate Report stated:

> "The program proposed by this Section [§301] will be implemented through permits issued in Section 402.
>
> . . . .
>
> "A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program.
>
> "The information on the technology of control developed under section 304 should facilitate the administration of this system." (S. Rept. 92-414 92d Cong., 1st Sess., at 42, 72 (1971).)

to point sources . . . within such categories and classes." (§304(b)(1)(B).) Congress explicitly set out the factors which EPA was to specify and elaborate with further precision in the regulations, such that they could "be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes." (§304(b)(1)(P).) These factors are--(1) the cost/benefit calculation for applying the technology, (2) age of the plant and facilities involved, (3) the process employed, (4) the engineering aspects of the application of various control techniques, (5) non-water quality environmental considerations such as the amount of energy required, and (6) other factors listed by the EPA. The same pattern is provided for regulations providing guidelines to be issued by EPA for the 1983 technological objective (§304(b)(2)(A) and (B)).

Thus, the statutory provisions mandating the content of the Section 304(b) regulations make it plain that in the context of the permit program Section 304(b) guidelines are not merely to identify the "best practicable" (1977) and "best available" (1983) technology (i.e., the degree of pollution reduction to be achieved). The guidelines are to provide the permit issuing authorities with EPA's elucidation, and elaboration in the context of the industry-category involved, of the factors to be taken into account in

actually applying the guidelines to a particular plant in a permit proceeding.

Summary of Argument

This Court does not have jurisdiction over this action.

The Act (§509, 33 U.S.C. §1369) provides for a method of judicial review of certain specific actions of EPA which is different from the normal review procedure under the Administrative Procedure Act. Section 509 provides that review by petition in the Courts of Appeals, rather than in the District Courts, shall apply only with respect to certain actions under Sections 301, 302, 306 and 307 and respecting permit applications under Section 402. Regulations under Section 304(b) are not mentioned in Section 509 and review therefore lies in the District Courts.

EPA, however, has attempted to classify regulations required under Section 304(b) as definitional only. This is the key to EPA's position that these are regulations under Section 301 for which review must be in this Court under Section 509. EPA is asserting that it has exercised a power which it says it finds in Section 301 to issue limitations by regulation, a position which Intervenors challenge. The regulations, despite the authority cited and the name, are not, EPA says, simply guidelines under 304(b), but are in fact limitations under 301 reviewable only in the Courts of Appeals.

"Effluent limitations" referred to in Section 301 play a very different role in the statutory scheme than effluent guidelines issued under Section 304(b). Notably, the Act does not provide a procedure for establishing effluent limitations under Section 301 apart from their being set through conditions of a permit issued pursuant to Section 402; there is no rulemaking route for independently establishing or issuing them. Section 301 in fact carefully requires that effluent limitations be achieved, not that they be separately established by rule. Guidelines on the other hand must by Section 304(b) be established by regulation, and as established, must contain two elements: the technological assessment of the reduction of pollutants in effluents, and the explication and elaboration of specified factors which are to be considered in applying the technology to an individual point source within a category or class of such sources. Thus, by mixing up regulations which EPA must issue under 304(b) with limitations which EPA asserts it can and has in fact issued under 301, EPA contends that it has rewritten the statutory pattern for developing and applying regulations applicable to discharges from "point sources," and as a consequence of this action, has "created" a review in this Court which the Act does not provide.

EPA's bold attempt to restructure the 1972 Act also touches the heart of the substantive issues presented in this action, if

the Court determines that it does have jurisdiction to decide them.

A central issue in this case is the meaning of the statutory requirements of Section 304(b) that EPA issue regulations providing guidelines for effluent limitations and the relationship of those guidelines to the objectives specified in Section 301. On the face of the statute, the guidelines are to be inherently "flexible" or susceptible of reasoned application to specific fact situations. The factors which must be set out in the guideline regulations have an obvious role in enabling the permit authority to issue permits with an even hand. When the plants are in an equivalent position respecting the factors, they receive identical requirements. When plants are in a disparate position relative to the applicable factors, the plants will have different requirements, with their required treatment geared to the impact of their different situations respecting the factors in relation to the technology to be applied.

In its regulations, EPA has acknowledged that Congress intended it to issue "flexible" regulations. The introduction to each guideline states:

> "Section 304(b)(1)(B) of the Act provides for 'guidelines' to implement the uniform national standards of section 301(b)(1)(A). Thus, Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology."1/ (Emphasis added.)

1/ This quotation is from the Feedlot Effluent Limitations Guidelines, 39 Fed. Reg. 5703, 5706 (February 14, 1974). Identical statements appear in the introduction to the other guideline regulations.

However, EPA now takes the position that it is not required by Section 304(b) to issue regulations specifying and elaborating the factors to be taken into account in determining control measures to be applicable to point sources. EPA did provide, in the part of the regulations being attacked by Petitioner, that a showing could be made with respect to the 1977 standard that the factors applicable to a plant are "fundamentally different" from those "taken into account" by EPA in establishing the guidelines. The States or EPA Regional Offices are authorized, only with prior approval of EPA's Washington headquarters, to issue a permit on the basis of such a showing taking into account the differences.

The regulations, notwithstanding this provision, are invalid because the regulations do not set forth the factors required by the statute. EPA did not follow the statutory command and set out in the guidelines the factors to be considered in applying the technology to a particular plant.

Argument

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER THE PROVISIONS OF SECTION 509 OR ANY OTHER STATUTE TO REVIEW THE EPA EFFLUENT GUIDELINE REGULATIONS

Petitioner seeks to invoke this Court's jurisdiction to review the EPA effluent guideline regulations for nine separate industry categories under the provisions of Section 509 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1369.

Based on EPA's past pronouncements, EPA will also take the position that this Court has jurisdiction over review of the guideline regulations. However, Intervenors differ with these views, and contend that the Courts of Appeals, and thus this Court, have no jurisdiction to review the guideline regulations. Section 509 calls for review of only a limited number of EPA regulatory actions, taken under explicitly listed sections of the Act, and Section 509 does not provide for review of regulations constituting guidelines issued under Section 304(b).

A. Review Under Section 509 Is Limited To Actions Taken Under Specified Sections Of The Act And Does Not Include Actions Under Section 304(b)

1. Neither the text nor the legislative history of Section 509 evidences an intent that Section 304(b) guideline regulations be within its purview

The normal method of review of actions by the Administrator under the Federal Water Pollution Control Act is under the Administrative Procedure Act, 5 U.S.C. §§701-706, as complemented by such ancillary jurisdictional statutes as the Mandamus and Venue Act of 1962, Pub. L. 87-748, codified in 28 U.S.C. §1361. See, e.g., Peoples v. United States Department of Agriculture, 427 F.2d 561, 564-565 (D.C. Cir. 1970). Congress chose, however, to establish a special review in the Court of Appeals for selected, specific, identified acts by the Administrator. Section 509(b), 33 U.S.C. §1369(b), provides:

> "(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Congress had a logical goal in mind when in Section 509 it provided for review in the Court of Appeals of certain of EPA's actions issued specifically and only under Sections 301, 302, 306 and 307 of the Act, and permits issued under Section 402 of the Act, 33 U.S.C. §§1311, 1312, 1316, 1317, 1342. Each of the substantive sections listed in Section 509 contains a prohibition, or authorizes EPA to promulgate regulations or to approve specially (without promulgation in regulations) restrictions or limitations, [1/]

1/ The method and basis under the authority of Sections 301 and 402 for EPA's approval of these restrictions and limitations and for EPA's enforcement of them is discussed extensively infra, at 31-40.

which may in certain circumstances be enforced by EPA (and the courts) directly against a violator, pursuant to the provisions of Section 309, 33 U.S.C. §1319. Moreover, the prohibitions, regulations, or specially-approved limitations or restrictions of the listed substantive sections may also be enforced by "citizen suits" brought against violators under Section 505(a), (f) of the Act, 33 U.S.C. §1365(a), (f). As a result, a special, definitive mode of review in the Court of Appeals was deemed appropriate, especially since such review would provide a judicial decision with as broad a reach jurisdictionally as any possible, save of course direct review by the Supreme Court.

On the other hand, review of actions by other agencies empowered to act under the Act and of actions by EPA other than those listed in Section 509 (and also in Section 309 and Section 505) were to proceed under the otherwise-applicable provisions of the APA. Review of these other actions, including the regulations constituting the effluent guidelines under Section 304(b) might be fully as important as review of the specially-listed actions, but the necessity to involve a busy court with jurisdictional power to issue a far-reaching decision in the first instance would not be in the normal course essential: the regulations issued under the non-specified sections often contemplate or require that further implementing steps be taken by the agency involved or by a court before direct applicability of such regulations is achieved.

No shadow is cast on the clear scope of Section 509 by the legislative history. Nothing in the legislative history suggests that Section 509 was intended to be more exclusive than its terms state or that regulations under Section 304(b) establishing effluent guidelines impliedly are to be reviewed under Section 509.

This analysis is confirmed by the subsequent history of the legislation. In December 1973 Congress made certain technical amendments to the 1972 Act. (See Pub. L. 93-207, 87 Stat. 906.) The purpose of the 1973 amendments was correction of "oversights or incorrect references . . . [that] do not alter the substance of the Act or depart from the original intent of the Congress." H.R. Rept. No. 93-680, 93d Cong., 1st Sess. (1973). While Congress in 1973 modified Section 509, the sole change was to designate pretreatment standards under Section 307(b)[1/] as being subject to review under Section 509. The Congress did not add effluent guidelines under Section 304(b) to the list of actions subject to special review under Section 509(b).

2. Section 509 applies only to a few of the actions which may be taken under the Act by EPA

A general statutory judicial-review plan to have all actions by EPA reviewable in the District Court except those designated in

1/ Significantly, the inclusion of these pretreatment standards under Section 307(b) was not accompanied by inclusion of pretreatment guidelines under Section 304(f), 33 U.S.C. §1314(f).

Section 509(b) is shown by a consideration of the many actions of EPA subject to review but not mentioned in Section 509(b). These actions include adjudications as well as various types of rule-making actions. A list of these EPA actions, which are reviewable under the Administrative Procedure Act in the same manner as the guidelines at issue here, is attached at Appendix C. Notably also, all actions taken under the authority of the Federal Water Pollution Control Act by agencies other than EPA are reviewable initially in the district courts under the APA. These actions include important adjudicatory and rulemaking decisions by agencies such as the Corps of Engineers, the Coast Guard, the Federal Maritime Commission, and the Council on Environmental Quality; none of these actions are included in the directly enforceable measures specified in Sections 309, 505 and 509.

B. EPA's Recently-Adopted Claim That The Regulations Also Constitute Effluent Limitations Under Section 301 Subverts The Basic Regulatory Framework Of The Act And Contravenes The Administrative Procedure Act

Very recently EPA has claimed that the guideline regulations serve a dual purpose; according to EPA, they constitute at one and the same time the guideline regulations mandated by Section 304(b) to be issued within a set time frame (one year from the enactment of the 1972 Amendments), and also "effluent limitations" under Section 301. EPA says that so far as they are guideline regulations, they are merely definitional and serve only to provide a

basis for issuance of regulations establishing effluent limitations under Section 301. Insofar as they are Section 301-limitation regulations, they serve, EPA asserts, as numerical restrictions which must be mechanically cranked into permits issued under Section 402 of the Act, without regard to consideration of the several factors which Section 304(b) requires be included and elaborated in guideline regulations and considered or taken into account in the application of the technological portion of the regulations.

EPA is attempting, in short, to perpetrate a total restructuring of the statutory requirements without basis in the law. For some as yet unexplained reason, it seeks to elide Section 304(b) from the statute for all practical purposes, and to conjure up in its place a special mechanism for devising effluent limitations by regulation which is without any statutory basis. In so doing, it is subverting the fundamental congressional scheme as embodied in the Act for establishing permits restricting the point-source discharges of effluents. The effect of EPA's actions has been and is to distort and delay its statutory obligation to issue regulations establishing effluent guidelines to be applied in permit proceedings where effluent limitations achieving the technological objectives required by Section 301 will be included in the permits. As matters now stand, EPA is casting aside any possibility of properly developing and issuing permits under Section 402 within the

deadline of December 31, 1974.[1/]

1. The regulations establishing effluent guidelines were, as required by the Act, promulgated under Section 304(b)

Section 304(b), 33 U.S.C. §1314(b), provides that "[f]or the purpose of adopting or revising effluent limitations under this Act, the Administrator shall . . . publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations . . . ." The regulations establishing effluent guidelines were promulgated under Section 304(b) of the Act, as EPA's own statements of legal basis for its actions indicate.

In August 1973 EPA announced the public review procedures with respect to "effluent limitations guidelines, standards of performance, and pretreatment standards for new sources pursuant to Sections 304(b), 306 and 307(c) of the Federal Water Pollution

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1/ Intervenors have filed a complaint in a Federal District Court seeking review of the Inorganic Chemical Category guidelines for the sulfuric acid subcategory. That action is styled E.I. DuPont de Nemours & Company, et al., v. Train, et al., No. 74-57-R (W.D.Va.). The jurisdictional issue and the questions of the nature of the regulations as guidelines or limitations have been raised through a plaintiffs' motion for partial summary judgment and a defendants' motion to dismiss. The District Court held an oral hearing on the motions on May 29, 1974 and a decision is now pending.

Intervenors have also filed petitions for review in the Fourth Circuit respecting guidelines for three categories--inorganic chemicals, plastics and synthetics, and organic chemicals--as a protective step. (See, e.g., E.I. DuPont de Nemours & Company v. Train, No. 74-1261 (4th Cir.); FMC Corporation v. Train, No. 74-1386 (4th Cir.); and Union Carbide Corp. v. Train, No. 74-1459 (4th Cir.).) The jurisdictional issue will also be raised in those proceedings.

Control Act." 38 Fed. Reg. 21202 (August 6, 1973) (emphasis added).[1/] The notice further (1) stated that its purpose was to "explain EPA's overall plans for development of effluent limitations guidelines . . . and the approach which is being taken by the Agency in discharging the duties placed upon the Administrator under [section] 304(b) . . . of the Act"; (2) emphasized the importance of public "exposure of the technical basis and reasoning underlying regulations to be established pursuant to Section 304(b), 306 and 307(c)"; (3) explained that the technical studies for which EPA contracted were to "serve as a foundation for the regulations to be issued under Section 304(b) and 306 of the Act"; and (4) requested comments on "its overall approach and legal interpretation of its responsibilities under Sections 304(b), 306 and 307(c) of the Act." (38 Fed. Reg. 21202, 21203, 21206 (August 6, 1973) (emphasis added).)

Thereafter EPA followed this indicated reliance on Section 304(b) in actually proposing guidelines for various categories of effluent dischargers. For example, the statement of "legal authority" in the preamble to the proposed regulations for the Cement Manufacturing Point Source Category relies specifically and solely on Section 304(b)

1/ Section 306 relates to National Standards of Performance for control of effluents from new plants and Section 307(b) relates to pretreatment standards (i.e., standards governing the pretreatment of waste being discharged into a municipal treatment plant). Those standards were promulgated concurrently with the guidelines, but do not overlap with them and are not relevant to this action.

for authority:

> "Section 304(b) of the Act requires the Administrator to publish regulations providing guidelines for effluent limitations . . . . The regulations proposed herein set forth effluent limitations guidelines, pursuant to Section 304(b) of the Act, for the cement manufacturing category." (38 Fed. Reg. 24462 (September 7, 1973) (emphasis added).)

This statement of legal basis for the regulations was incorporated by reference and without modification in the preamble to the final regulations published on February 20, 1974.[1/]

In contrast, EPA had simply referred to Section 301 as a provision whose implementation is to be aided by issuance of Section 304(b) guidelines. Such reference occurred in the August 6 public-review procedures publication,[2/] in the preamble to the proposed cement manufacturing category regulations,[3/] and in the

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1/ "The legal basis . . . which support[s] promulgation of this [cement manufacturing category] regulation [was] set forth in substantial detail in the notice of public review procedures published August 6, 1973 (38 Fed. Reg. 21202) and in the notice of proposed rulemaking . . . ." 39 Fed. Reg. 6590 (February 20, 1974).

2/ This Federal Register notice contains a reference "to the development of regulations under Sections 301, 304(b), 306 and 307(c) of the Act." 38 Fed. Reg. 21206 (August 6, 1973).

3/ "Notice is hereby given that effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources set forth in tentative form below are proposed by the Environmental Protection Agency (EPA) for the cement manufacturing category of point sources pursuant to Sections 301, 304(b) and (c), 306(b) and 307(c) of the Federal Water Pollution Control Act . . . ." 38 Fed. Reg. 24462 (September 7, 1973).

preamble to the final regulations.[1/] Throughout these proceedings, EPA recognized the fact that the effluent guidelines under Section 304(b) are to be promulgated for the purpose of achieving and implementing the statutory standard set forth summarily in Section 301(b).

2. The decision in NRDC v. Train reflects that Section 304(b) is the basis for the regulations.

The Act was passed and became effective October 18, 1972. It set a one year deadline for promulgating the guideline regulations. When EPA did not meet the one year deadline, the Natural Resources Defense Council (the Petitioner here) brought suit in the District Court in the District of Columbia seeking an order requiring EPA to publish guidelines according to a time schedule for each of a number of industry categories. Natural Resources Defense Council, Inc. v. Train, 6 E.R.C. 1033 (D.D.C. 1973). On Motion for Summary Judgment, the Court granted an order which stated in part that:

> "1. Defendants [EPA] have a mandatory, non-discretionary duty to publish within one year of enactment of the Act final Section 304(b)(1)(A) effluent limitation guidelines necessary to provide comprehensive coverage of all point source discharges;

1/ "The purpose of this notice is to establish final effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources in the cement manufacturing category of point sources . . . . This final rulemaking is promulgated pursuant to Sections 301, 304(b) and (c), 306(b) and (c) and 307(c). . . ." 39 Fed. Reg. 6590 (February 20, 1974).

2. The proposed schedule for publication of the guidelines shall have a final deadline of no later than October 1, 1974, in order that the guidelines may be applied meaningfully in the NPDES permit program established by Section 402 of the Act." (6 E.R.C. at 1033) (emphasis added).)

The Court's schedule required that EPA promulgate guideline regulations for all the categories according to a priority established for one group of categories over another group, and then also dividing many of the categories into two phases whereby guidelines could be issued for one phase earlier than the other. The Court order required all nine of the industry category guidelines involved in this action to be issued as part of the early group (Group I) of guideline regulations to be published.[1/]

3. EPA has attempted to confuse effluent guidelines under section 304(b) and effluent limitations under section 301.

As discussed above, the preamble to the final guideline regulations for each of the categories involved in this action adopts the statement of legal basis found in the proposed regulations. And, the proposals carefully distinguished guidelines from limitations, as illustrated by the proposal for the cement manufacturing category. Yet, for the basis of the regulations EPA seems now to point almost

1/ Some of the categories were divided into phases. For example, Phase I of the Phosphate Manufacturing Category guidelines were to be issued on or before February 1, 1974, but Phase 2 was ordered to be issued on or before September 23, 1974.

On March 14, 1974, by Memorandum Order issued upon EPA's application for modification of the earlier order, the Court set a new schedule which provided for publication of regulations for certain categories of the guidelines on a later schedule than that originally set.

exclusively to a cryptic citation of Section 301, among other sections, in the preamble of the final guideline regulations: "This final rulemaking is promulgated pursuant to Sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act . . . ." (39 Fed. Reg. 6590.) (Emphasis added.)

EPA now claims that the regulations constitute "effluent limitations" under Section 301(b) as well as guidelines under Section 304(b), and further, that the status of the regulations as limitations far overshadows their mere "definitional" character as guidelines. EPA first stated its position when it released for public distribution and dissemination an "Environmental Protection Agency Memorandum on Judicial Review of Effluent Limitations Guidelines", dated February 25, 1974 (attached infra as Appendix B, and also reprinted at 4 Environment Reporter, Current Developments, at 1833-1834). It subsequently elaborated its position in a Memorandum of Law, and a Supplemental Memorandum, supporting a motion to dismiss the district court action brought by Intervenors to obtain review of the regulation setting the effluent guidelines for the sulfuric acid subcategory of the inorganic chemicals manufacturing category (E.I. DuPont de Nemours & Company, et al. v. Train, et al., No. 74-57-R (W.D.Va.)).

4. It is too late under the Administrative Procedure Act for EPA to claim that the regulations constitute effluent limitations under Section 301

EPA's action in asserting that it was issuing the final Section 304(b) guidelines as effluent limitations within the meaning of Section 301(b) as well came as a surprise to those persons and firms who were interested in the guidelines and in their impact. Prior to issuing the final guidelines, EPA had uniformly taken the position expressed in the proposed cement guidelines that the final version was to constitute a set of guidelines[1/] to be used in developing permits for dischargers under Section 402 and thus in achieving the requirements of Section 301(b) respecting limitations.

Obviously, guideline regulations, being inherently flexible because they contain the specific factors bearing on their application, could be applied effectively in a permit proceeding on an individual industrial plant. In such a proceeding the plant's characteristics and effluent discharge could be evaluated in light of both the pollutant-reduction technology generally applicable to that plant and the factors which in fact affected the actual application of the technology to the plant. The resulting restriction

1/ Interestingly enough, through the time EPA was issuing the guideline regulations for the feedlots, glass, phosphate, and cement categories, EPA used the heading "Effluent Guidelines" to describe the regulations, and only thereafter did it shift to the "Effluent Limitations Guidelines" language. Compare 39 Fed. Reg. 5703, 5711, 6579, and 6589 (February 14 and 20, 1974) with 39 Fed. Reg. 6805 (February 22, 1974).

on the effluent discharge from the plant (the "effluent limitation") would reflect a reasoned judgment by EPA or the State respecting that plant's situation. EPA at first seemed to be willing to travel this statutorily-specified path. But, through an evolution of views EPA seems to have resolved to convert what were proposed as guideline regulations into actual effluent limitations which would be "mechanically" applied to a plant or discharge point source to which it was relevant. (See Defendants' Supplemental Memorandum, at 3, E. I. DuPont de Nemours & Co. v. Train, No. 74-57-R (W.D.Va.).)

This switch was not spelled out in the final guideline regulations or in the preamble to them, but instead was first disclosed in the EPA publicly-distributed memorandum in late February and then expanded and elaborated in the subsequent court proceedings.

If EPA is allowed to make such a concealed or secretive switch in adopting the final regulations, it will have rendered ineffective the results of the Federal Register notice and the public comments which went into development of the proposed regulations. No one commented on the proposed regulations in the expectation that, although they were called guidelines, they were in fact "limitations" which were to be applied mechanically in permit proceedings without reference to the factors required to be included and elaborated in the guideline regulations.

EPA's action in only now denominating the regulations as effluent limitations at the very least constitutes rulemaking without notice and by fiat; under such circumstances the status of the regulations as limitations contravenes the Administrative Procedure Act.

The 1972 Amendments authorize the Administrator of EPA "to prescribe such regulations as are necessary to carry out his functions under the Act." (§501(a), 33 U.S.C. §1361(a).) But, nothing in this authorization or any remaining provision of the Act allows EPA to avoid or evade the rudimentary notice and opportunity-to-comment requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. §553. See Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972); cf. Pharmaceutical Mfrs. Assn. v. Finch, 307 F. Supp. 858 (D. Del. 1970). In the Wagner Electric case, the Court of Appeals set aside a regulatory standard promulgated by the National Highway Traffic Safety Administration in comparable circumstances.

C. The Act Does Not Contemplate That Effluent Limitations Are To Be Prescribed By Regulation, Nor Does It Authorize Such Regulations

The language of the Act and the regulatory scheme it establishes demonstrate that the Administrator has no power to establish effluent limitations by regulation. Section 301(b), 33 U.S.C. §1311(b), provides in part that:

> "(b) In order to carry out the objective of this Act there shall be achieved--
> (1)(A) not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act . . . ."

Section 301(b) only requires that effluent limitations based on technology defined by EPA in the guidelines be achieved, not that effluent limitations be independently established and achieved. Furthermore, no procedure for establishing limitations from effluent guidelines is contained in Section 301(b). Notably also, in view of the many other time limits contained in the Act for various rule-making steps, no time limit is mentioned for establishing limitations--although, of course, the objective is that the two types of Section 301(b) limitations must be achieved by July 1, 1977 and July 1, 1983.

On the other hand, the one-year deadline for publication of Section 304(b) guidelines underlines the congressional intention that the guidelines be available to establish the range of base points to be used in processing permit applications under Section 402. The Act became law (it was immediately effective) on October 18, 1972. A "moratorium" until December 31, 1974, on enforcement of most violations of the Act where applications for Section 402 permits were pending was written into Section 402(k) of the Act, 33 U.S.C. §1342(k). Thus, Congress provided for a period of just over two years and two months for EPA (and the States) first to develop the procedural framework and substantive guidelines for processing permits, and second, to complete the permit process. Congress reserved the first year for development of the procedural rules and the substantive effluent guidelines (under Section 304(b))

and then allowed a period of one year and several months for implementation through the permit process.

Given this tight time schedule, Congress decided not to force EPA to develop binding or prescriptive effluent limitations independently by regulation. Rather, by providing specifically for regulations constituting effluent "guidelines",[1/] Congress allowed rapid development of regulations which would offer some play in the joints of the entire regulatory scheme to correct any difficulties created in their application to the many and varied individual permit situations.

Why EPA has deviated from this statutory scheme is a matter of pure conjecture at the moment, but the crucial legal circumstance now is the failure by EPA to issue guidelines under the Act which could be applied to individual plants in permit proceedings.

EPA has argued that the judicial review provisions of the Act (§509, 33 U.S.C. §1369) imply that effluent limitations at least can

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1/ "Guidelines" are employed in other areas of law where a range of actions is reasonable and appropriate and hard and fast rules are not deemed suitable. For example, HEW issues guidelines and not prescriptive regulations for school desegregation plans. United States v. Jefferson County Board of Education, 372 F.2d 836, 847-848 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). The Council on Environmental Quality has issued rules (40 C.F.R. Part 1500) to aid in the implementation of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. §4332(2)(C), which provide guidelines and do not constitute or "prescribe regulations governing compliance with NEPA". Greene County Planning Board v. Federal Power Commission, 455 F.2d 412, 421 (2d Cir. 1972).

exist in the form of regulations issued under Section 301, and thus that there is implied authority in the Act for such regulations. This argument was made in the publicly-distributed EPA Memorandum dated February 25, 1974, from Alan G. Kirk, II, the Assistant Administrator for Enforcement and General Counsel (attached as Appendix B).

Rather than supporting EPA's claim, the provisions of 509 and other related sections indicate clearly that Congress had no intention that regulations establishing effluent limitations be issued under Section 301. In fact Congress had to insert specific language in Section 509 to take into account the fact that effluent limitations under Section 301 were not to be issued by regulation but rather through permits.

The definitional section of the Act provides that--

> "The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." (§502(11), 33 U.S.C. §1362(11) (emphasis added).)

Obviously a State could not issue regulations implementing Section 301, so the definition itself indicates (1) that effluent limitations do not involve regulations and (2) that the States and the Federal EPA have a shared role in establishing effluent limitations.

Section 509 provides in relevant part that--

> "(b)(1) Review of the Administrator's action . . .
> (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States . . . ."
> (§509(b)(1), 33 U.S.C. §1369(b)(1) (emphasis added).)

Accordingly, Section 509(b)(1) calls for review (1) of action of the "Administrator", not others, (2) in either "approving or promulgating" (in the alternative), (3) "any effluent limitation or other limitation" (again in the alternative), (4) "under section 301, 302, or 306".

Several aspects of this language are important here. First, Congress used the alternative language "approving or promulgating" and this indicates that the Administrator may not always be in a position (i.e., have the authority) to promulgate effluent limitations. Instead his prescribed role, at least in some instances, is to approve effluent limitations. Second, review is provided respecting a broad category of limitations, or in the words of the statute, "any effluent limitation or other limitation". Third, such a limitation may be derived from either Section 301 or Section 302 or Section 306 of the Act.

One, and only one, of these three listed sections provides for actual promulgation of effluent limitations by the Administrator.[1/]

1/ There is a very minor exception to this statement that all "promulgation" of limitations occurs through the authority provided by Section 302. Section 301(c) contains an extraordinarily limited provision which takes effect after July 1, 1977, and which appears to provide EPA with authority actually to promulgate a special limitation for a single point source directly by Order and not by regulation. Such an order would modify to make less restrictive the 1983 requirements in certain narrow and carefully specified circumstances.

Section 302(a) authorizes the Administrator to promulgate "water quality"-related "effluent limitations" when the Administrator finds that

> "the application of effluent limitations required under section 301(b)(2) of this Act [the technology-based limitations required to be achieved by 1983], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies,. . . [etc.]." (33 U.S.C. §1312(a).)

This "water quality" effluent limitation is to be set after notice and after a public hearing, and after consideration of factors specified in Section 302(b). It is to be developed for "a point source or group of point sources" (§302(a)), i.e., for one plant or a small group of plants along a stream or other water body so polluted through natural, municipal, or industrial discharges that the technology-based controls of Sections 301 and 304(b) are not adequate. Section 302 does not mention "regulations". From the nature of the procedure spelled out in the section for setting limitations, the Administrator apparently would set them by an Order which applied directly and which did not involve regulations. However, the Administrator's action in setting "water quality"-related effluent limitations under Section 302 would nonetheless be a "promulgati[on]" of such a limitation such that review of this action could be had under the terms of Section 509(b)(1)(E), 33 U.S.C. §1369(b)(1)(E).

In contrast, both the reference to Section 301 and Section 306 in Section 509(b)(1)(E) are related to the action by the Administrator in "approving" effluent or other limitations. The pattern of action respecting Section 301 is set out in the statute in greater detail and will be discussed first.

Several points relevant to the Section 301 limitations have already been made. First, in the earlier discussion it was emphasized that the 1977 and 1983 technologically-based effluent limitations be "achieved", not specified in regulations. Second, the definition of effluent limitations as found in Section 402(11) specifically provides for effluent limitations to be set by States as well as by the Administrator. Third, EPA was mandated by Section 304(b) to promulgate effluent-guideline regulations within one year after enactment of the 1972 Amendments.

Section 402 respecting permits for discharges knits together these statutory threads. Under Section 402(b)-(f), a State can develop a suitable plan for implementing a permit program and thereby displace the permit program established by EPA under Section 402(a), for the State's geographical area. To be an appropriate "approved" program the State permit program must, among other things, apply the substantive requirements set by the Act and the Administrator for point source discharges (§402(b)(1)). When the approval of the

State permit program acts to transfer permit authority to the State through operation of the Act, EPA is not divested of all control over the permit process in that State. Congress in Section 402(d) provided for review and veto by the Administrator[1/] of individual permits issued by States with approved programs--

> "(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.
> "(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act." (Emphasis added.)

Thus, the Administrator can veto, or in other words, fail to approve, a permit if it does not meet the "guidelines and requirements of the Act." This reference of course includes the EPA regulations under Section 304(b) establishing effluent guidelines, for these are to be available within a year after enactment of the 1972 Amendments for the States to use in drawing up the permits. And, through

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1/ The Administrator may also invoke a statutorily-set procedure for withdrawing the approval for the State program, under Section 402(c)(3). But this withdrawal of approval is a drastic remedy which would eliminate the State completely as a participant in the Act's scheme.

use of the effluent guidelines, the State is to set in the permit the effluent limitations within the meaning of the definition found in Section 502(11). As a result, in reviewing the proposed permit forwarded by the State, EPA is reviewing and approving or disapproving[1/] the effluent limitations set by the State in that proposed permit.

Consequently, Section 509(b)(1) authorizes review in the Federal Courts of Appeals of EPA action in reviewing the terms of a State-proposed permit. Among other things, this provision solved for Congress the problem of how Federal review could be obtained for a State-issued permit. Congress could, and did, have Federal judicial review attach to the one aspect of Federal involvement in the otherwise entirely-State proceeding.

Section 306 follows a pattern identical to Section 301 insofar as Federal approval of State-initiated limitations is concerned.

1/ Earlier versions of the bill that became the Federal Water Pollution Control Act Amendments of 1972 actually required EPA to take the affirmative step of approving the permit's effluent limitation before the State-proposed permit could become effective. S.2770 (the bill which ultimately became law) in the form in which it was passed by the Senate provided that: "No permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of the Act." (S.2770, §402(d)(2), 92d Cong., 1st Sess. (1971), reprinted in Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., at 1690 (Committee Print, 1973).) Understandably, at that time the language of Section 509(b) contained the "approving or promulgating" reference (see id., at 1713) which it still retains, although in the enacted version of the bill the EPA review function has changed slightly to one of having to make a disapproval.

Section 306 provides for EPA promulgation of "standards of performance" for "new sources" of effluent discharges, and Section 509 contains a separate provision authorizing review in the Courts of Appeals of these "standards of performance". (§509(b)(1)(A).) But, Section 306 in addition authorizes States to develop and submit to EPA a "procedure" to apply and enforce these standards. After reviewing the procedure EPA can approve it whereupon the State is the chief actor displacing EPA in application and enforcement of the standards except insofar as Federally-owned or operated sources are concerned. (§306(c).) The State implementation logically occurs in permit proceedings and the EPA review and possible disapproval of State action in setting an actual limitation in the proposed permit are the same as they are in the case of the interplay of Sections 301, 304(b) and 402(d), previously discussed.

In short, the language of Section 509 was carefully drafted by Congress to take account of the special place effluent limitations were to have in the statutory scheme. Since effluent limitations under Section 301 were not to be "promulgated" through regulations issued by EPA, the "approving" language had to be inserted in Section 509 to provide for judicial review of EPA's action in reviewing effluent limitations contained in proposed State permits forwarded to EPA under Section 402(d). Where EPA itself had the

permit-issuing authority, Federal judicial review in the Courts of Appeals of the effluent limitations in the permit was provided by Section 509(b)(1)(F) which deals with action by the Administrator in issuing or denying any permit under Section 402.

A reference to "an effluent limitation or other limitation under 301 and 302 of this Act" is found in Section 505(f)(2), 33 U.S.C. §1365(f)(2), which authorizes citizen suits to redress violations of the Act. This reference carries the same meaning as it does in Section 509, i.e., a Section 302 "water quality" related effluent limitation is set directly by Order of the Administrator under the procedures specified in Section 302, and a Section 301 effluent limitation may be found in either a Federal or State permit. Even if a permit issued by a State under an approved program is involved, the EPA participation in reviewing and disapproving the effluent limitation in the permit gives the matter a sufficient Federal tie to allow for direct enforcement in Federal courts. In this context also, a citizens suit would lie to enforce the limitation in Section 301(a) forbidding discharges without a permit.

Section 309 also contains several references to effluent limitations which implement Section 301, but in Section 309 the references to the presence of the limitations in State permits are explicit. Section 309(a)(1) refers to a

> "violation of any condition or limitation which implements section 301, 302, 306, 307, or 308 of this Act in a permit issued by a State under an approved program under section 402 of the Act . . . ." (Emphasis added.)

Section 309(a)(3) refers to a

> "violation of any permit condition or limitation implementing any of such sections [301, 302, 306, 307, or 308] in a permit issued under section 402 of this Act by him [the Administrator] or by a State . . . ." (Emphasis added.)

Section 309(c)(1) refers to a person who violates

> "any permit condition or limitation implementing any of such sections [301, 302, 306, 307, or 308] in a permit issued under section 402 of this Act by the Administrator or by a State . . . ." (Emphasis added.)

And lastly, Section 309(d) refers to

> "any permit condition or limitation implementing any of such sections [301, 302, 306, 307, or 308] in a permit issued under section 402 of this Act by the Administrator, or by a State . . . ." (Emphasis added.)

These references show beyond doubt that States, and the Administrator as well, are to place the effluent limitations in permits, that necessarily such limitations apply only to the effluent discharge restricted by the permit, and that the limitations implementing Section 301 can be enforced by the Administrator under Section 309 and through citizen suits under Section 505. If set by a State the limitation is reviewable in the Federal Courts of Appeals under Section 509(b)(1)(E), because of the EPA "approval"

involved, and if set by EPA it is reviewable in the Federal Courts of Appeals under Section 509(b)(1)(F), which provides for review of the action of the Administrator in issuing or denying any permit under Section 402.

Thus, in sum, the Act is so structured that there is no place whatsoever for EPA's action in trying to denominate or consider the regulations under review here as effluent limitations. Why EPA has chosen to disregard the statutory scheme and to frustrate implementation of the Act is not obvious at all, but EPA has done so by its illegal actions respecting these regulations, and it should be set straight without delay.

II. THE REGULATIONS ESTABLISHING EFFLUENT GUIDELINES DO NOT COMPLY WITH THE STATUTORY REQUIREMENTS

The issue raised by Petitioner relates to the validity under the statute of regulatory language which is identical in each of the nine industry-category guidelines involved in this action.[1/] This issue should, Intervenors contend, be presented to the District Court for review under the Administrative Procedure Act and related jurisdictional statutes. While we believe that this Court lacks jurisdiction to review the regulations under Section 304(b) in this proceeding, this section of the brief is addressed to Petitioner's contention.

Petitioner has limited its attack to the identical provisions in each of the effluent limitation guidelines which authorize the EPA to grant what Petitioner calls exceptions to the effluent limitations guidelines. Petitioner's attack is directed at those provisions which allow an individual discharger to show that the "factors" applicable to his plant are "fundamentally different"

1/ Similar language is also contained in the effluent-guideline regulations for the inorganic chemicals manufacturing category, the plastics and synthetics category, and the organic chemicals manufacturing category, each of which are the subject of review actions in the U. S. Court of Appeals for the Fourth Circuit. (See supra, at 20 n. 1.) To Intervenors' knowledge the provision is contained in each industry-category guideline issued by EPA except the Insulation Fibreglass Subcategory and the Beet Sugar Processing Subcategory, which were the first guideline regulations issued by EPA. See 39 Fed. Reg. 2563 (January 22, 1974) and 39 Fed. Reg. 4033 (January 31, 1974). Notably, at that time, and through the time EPA was issuing the guideline regulations for the feedlots, glass, phosphate, and cement categories, EPA used the heading "Effluent Guidelines" to describe the regulations, and only thereafter did it shift to the "Effluent Limitations Guidelines" language. Compare 39 Fed. Reg. 5703, 5711, 6579, and 6589 (February 14 and 20, 1974) with 39 Fed. Reg. 6805 (February 22, 1974).

from the factors considered "in the establishment of the guidelines" and, upon such a showing, the permit granting authority is empowered to issue a permit taking those different factors into account. (See e.g., the Feedlots Point Source Category Effluent Guidelines, 39 Fed. Reg. 5703, 5706, 5707 (February 14, 1974).)

Intervenors agree with the Petitioner that the guidelines fail to comply with the statute, but for very different reasons and on a totally different basis. Intervenors have pointed out above that the guideline regulations under Section 304(b) were designed to set a range of limits which in the light of the statutory factors would be considered by the permit granting authority in issuing a permit. In such guideline regulations, a procedure for the permit-granting agency to vary from the effluent guideline for a plant as to which the factors were "fundamentally different" from those considered in the establishment of the guideline would be appropriate.

However, that procedure would not cure the defect in EPA's present regulations. EPA totally failed to set out, as Section 304(b) requires the regulations set out, the statutory and other factors bearing on the application of the technology to the differing situations in plants across the nation.

This is confirmed by the legislative history. The Conference Report on the bill states:

> "The Administrator is expected to be precise in his guidelines under subsection (b) of this [304] section, so as to assure that similar point sources with similar characteristics, regardless of the location or the nature of the water into which the discharge is made, will meet similar effluent limitations." (H. Rept. No. 92-1465, 92d Cong., 2d Sess., at 126 (1972) (emphasis added).)

Uniformity of treatment when conditions vary is possible only when plants with similar characteristics receive similar treatment. Identical treatment of all plants with dissimilar characteristics was not intended by Congress. Instead EPA established a single unvariable number which was to be applied by rote or "mechanically" in permits to all plants whatever their circumstances. The fact that EPA felt compelled to provide an escape valve from the rigid structure it had created underlines the failure of EPA to publish guidelines in conformity with the statute.

A. EPA Has Failed To Specify Factors Relevant To The Actual Application Of Technology As Required By Section 304(b)

To comply with the statute guideline regulations must first identify the degree of effluent reduction attainable through (for 1977) "the best practicable control technology currently available for classes and categories of point sources . . . ." (§304(b)(1)(A)). For 1983 it must identify the reduction through application of "best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources . . . ." (§304(b)(2)(A).)

While these provisions clearly envision regulations embodying establishment of ranges and various methods of applying controls to existing plants, the Congress underlined that point by directing that the regulations "shall . . . specify factors to be taken into account in determining control measures and practices to be applicable to point sources" within the categories and classes the EPA

was directed to establish. (§304(b)(1)(B) (emphasis added).) There can be no doubt as to the intention, for with reference to 1983, EPA is directed to specify factors applicable "to any point source" within the classes or categories.

The statute went far beyond this requirement, clear as it is, by setting out factors bearing on the application of the pollution control technology identified by EPA. In Section 304(b)(1)(B) Congress listed the main factors which EPA "shall" specify in the regulations:

> (1) the total cost in relation to the benefits to be achieved, a vital determination;
> (2) "age of equipment and facilities", a matter obviously of importance in the application of technology which otherwise might require total rebuilding;
> (3) "the process employed" and "process changes" and there are variations in process with respect to each product or category;
> (4) "the engineering aspects of the application of various types of control techniques", dealing not only with the type and age of plant but climatic conditions and availability of land, a factor which has a direct bearing on how the technology can be applied and its cost in relation to benefits;
> (5) "non-water quality environmental impact (including energy requirements)" making it necessary to consider the comparative environmental benefits and hazards for increased generation of electricity, from the production and deposit of solid waste and from the impact of the pollution control facilities on surrounding areas, and
> (6) such other factors as the Administrator deems appropriate.

It is difficult to see how the Congress could be more clear in its intention and direction that the regulations under Section 304 become the means enabling the permit authorities (EPA or the States) acting under Section 402 to fix effluent limitations in the permits so that the "objectives" set out in Section 301 would be "achieved". Since it is the policy of the Congress that pollution control be administered by the various States (see §§402(b)-(f) and 510), it is clear why Congress was so detailed and exact in specifying what should go into the guideline regulations. With over fifty potential permit issuing authorities, the uniformity that Congress sought would not be possible unless the permit authorities had regulations not only setting out the technology but the factors to be determinative in deciding how the technology should be applied in the wide variety of situations.

B. The Legislative History Confirms That Congress Intended EPA To Establish A Range Of Discharge Levels In The Guidelines

The requirement that EPA establish a range of effluent loadings or benchmark numbers to be applied in light of the factors listed in the Act and EPA's guidelines is firmly rooted in the language of the statute and is further substantiated by the legislative history. The Senate's consideration of the Conference Report leaves no doubt that Congress expected the Administrator to discharge his task of establishing guidelines by setting a range for effluent discharges:

> The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of

> various sizes, ages, and unit processes within each industrial category. (Sen. Rept. 92-414 92d Cong. 1st. Sess., at 50 (1971), and also 118 Cong. Rec. S16873 (daily ed., October 4, 1972 (summary of Act prepared by Senator Muskie) (emphasis added).)

Furthermore, the Senate Report states:

> In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants, within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. (S. Rept. No. 92-414, 92d Cong. 1st Sess., at 50 (1971).) 1/

It is evident, however, from the format of the guidelines and pronouncements in other publications, that EPA believes that the subdivision of industries into categories of process responds to the "range" envisioned by Congress. But the range Congress envisioned is within classes and categories. The flaw in EPA's approach is exacerbated by the Agency's failure to specify and elaborate in any way whatsoever in any of the guideline regulations involved here the factors it is required by Section 304(b) to set out as a coequal part of the guidelines along with the "degree of effluent reduction" range of benchmarks.

1/ See also H. Rept. 92-911, 92d Cong., 2d Sess., at 107 (1972).

C. The Guideline Regulations, Including The Flexibility Provisions Petitioner Attacks, Are Invalid

The guideline regulations before the Court, on their face do not comply with the statute. There is no discussion of the statutory factors and no guidance to the permit authorities as to how the factors are to be considered. Widely differing conditions apply to plants in each of the industries. But EPA leaves the permit-setting authorities with none of the guidance the statute demands.

EPA did recognize that a single number limiting discharge without any elucidation as to statutory factors creates a fatal rigidity in its guidelines. In that part of the regulations which petitioner attacks, EPA attempted to introduce some "flexibility" into its otherwise totally rigid set of single numbers. In an identical introduction in each guideline, EPA acknowledged that Congress intended that it issue guidelines that are "flexible" i.e. susceptible of adaptation to specific fact situations. The introduction[1/] states:

> "(6) Section 304(b)(1)(B) of the Act provides for 'guidelines' to implement the uniform national standards of section 301(b)(1)(A). Thus Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology. In conformity with the Congressional intent and in recognition of the possible failure of these regulations to account for all factors bearing on the practicability of control technology, it was concluded that some provision was needed to

1/ The quotation is from the Feedlots Category guidelines, 39 Fed. Reg. 5703, 5706 (February 14, 1974).

> authorize flexibility in the strict application of the limitations contained in the regulation where required by special circumstances applicable to individual dischargers. Accordingly, a provision allowing flexibility in the application of the limitations representing best practicable control technology currently available has been added to each subpart, to account for special circumstances that may not have been adequately accounted for when these regulations were developed." (39 Fed. Reg. 5706) (February 14, 1974) (emphasis added).)

EPA's proposed implementation of the Congressional intent by the provision which Petitioner attacks fails completely to comply with the statute. What EPA has done is to establish a new provision not grounded in the statute in an effort to escape from the single number which it has otherwise made inflexibly applicable contrary to Congress' statutory directives. EPA has required a plant to show that the "factors" applicable to it were "fundamentally different from the factors considered in the establishment of the guidelines." In the Feedlots Category guideline regulations EPA states:

> In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the

> equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharge effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations . . . .
>
> [T]he following limitations establish the quantity or quality of pollutants or pollutant properties which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: There shall be no discharge of process waste water pollutants to navigable waters. (40 C.F.R. §412.12, added by 39 Fed. Reg. 5703, 5707 (February 14, 1974).)

Significantly, apart from the statement that EPA considered the statutory factors, the guidelines provide no clue to the reviewing Court or to the permit issuing authorities as to what that consideration amounted to. And there is no guidance to the permit authorities as to what standard should be applied to identify factors "fundamentally different" from those considered by EPA.

An examination of the statute shows that EPA is correct that Congress intended "some flexibility" in the guidelines. Had EPA followed the statute and included in its regulations the factors bearing on the application of the technology a provision for a "fundamentally different" situation may have been both sensible and appropriate, since the totally unforeseen situation may arise. But the area within such a provision would have operated had EPA complied with the statute would be narrow and truly exceptional, because it would have to be outside any of the situations contemplated by the multi-faceted "factor" portion of the guideline regulations. Moreover, with the factors set out as the statute directs, the permit authority would be able to identify that "fundamentally different" situation since it would have a standard against which to measure the difference.

D. The Regulations Abrogate The Congressional Purpose Of State Administration Of Water Pollution Control

EPA's regulatory approach abrogates the Congressional purpose that the States be given the responsibility for the administration of water pollution control, since the decisions as to the "fundamentally different" factors can be made under the regulations only by EPA's Washington headquarters. When EPA failed in its statutory duty to incorporate in the regulations a consideration of the statutory factors against which the "fundamentally different" factors could be judged, State administration was necessarily ousted and the decision left to Washington EPA. By referring the "fundamentally

different" issues back to its Washington headquarters without fulfilling its statutory duty to set out the statutory standards or factors to be applied, EPA is attempting to change the statutory plan and substitute future administrative discretion for the obligation which EPA has under the statute to develop the guidelines which the States will administer. A recognition that a few situations may be "fundamentally different" may be valid in guidelines with the reference factors, for then the Congressional plan of State administration would not have been frustrated.

Should the Court conclude that it has jurisdiction to review these regulations, it should set the regulations aside and remand them to EPA with the direction that EPA comply with the statute and issue regulations in conformity with Section 304(b). Such action would eliminate any need to parse out the text of an appropriate special-flexibility provision on "fundamentally different" plants, for it would require EPA to follow the statute and issue inherently flexible "guidelines".

Conclusion

The Court should dismiss the petition on the ground that it lacks jurisdiction in this proceeding to review regulations under Section 304(b). Should the Court conclude that it has jurisdiction, the regulations should be set aside and remanded to EPA with

directions to comply with the requirements of Section 304(b).

Respectfully submitted,

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Dated: June 17, 1974

APPENDIX A

The pertinent provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 et seq., are as follows:

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281 (g) (2) (A) of this title.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste

(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844.

§ 1312. Water quality related effluent limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b) (2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) (1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

June 30, 1948, c. 758, Title III, § 302, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 846.

§ 1314. Information and guidelines—Criteria development and publication

(a) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

Effluent limitation guidelines

(b) For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, published within one year of October 18, 1972, regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

Pollution discharge elimination procedures

(c) The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

Secondary treatment information; alternative waste treatment management techniques and systems

(d) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1281 of this title.

Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

(e) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

Guidelines for pretreatment of pollutants

(f) (1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

Test procedure guidelines

(g) The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishiing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

(h) The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.)

Restoration and enhancement of publicly owned fresh water lakes

(i) The Administrator shall, within 270 days after October 18, 1972 (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

Agreements with Secretaries of Agriculture, Army, and Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations

(j) (1) The Administrator shall, within six months from October 18, 1972, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title.

(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out appropriate programs authorized to be carried out by such Secretaries.

(3) There is authorized to be appropriated to carry out the provisions of this subsection, $100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974.
June 30, 1948, c. 758, Title III, § 304, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 850.

§ 1316. National standards of performance—Definitions

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

Categories of sources; Federal standards of performance for new sources

(b) (1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;
paperboard, builders paper and board mills;
meat product and rendering processing;
dairy product processing;
grain mills;
canned and preserved fruits and vegetables processing;
canned and preserved seafood processing;
sugar processing;
textile mills;
cement manufacturing;
feedlots;
electroplating;
organic chemicals manufacturing;
inorganic chemicals manufacturing;
plastic and synthetic materials manufacturing;
soap and detergent manufacturing;
fertilizer manufacturing;
petroleum refining;
iron and steel manufacturing;
nonferrous metals manufacturing;
phosphate manufacturing;
steam electric powerplants;
ferroalloy manufacturing;
leather tanning and finishing;
glass and asbestos manufacturing;
rubber processing; and
timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

State enforcement of standards of performance

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

Protection from more stringent standards

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

Illegality of operation of new sources in violation of applicable standards of performance

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

June 30, 1948, c. 758, Title III, § 306, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 854.

§ 1317. Toxic and pretreatment effluent standards; establishment; revision; illegality of source operation in violation of standards

(a) (1) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section. The Administrator in publishing such list shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

(2) Within one hundred and eighty days after the date of publication of any list, or revision thereof, containing toxic pollutants or combination of pollutants under paragraph (1) of this subsection, the Administrator, in accordance with section 553 of Title 5, shall publish a proposed effluent standard (or a prohibition) for such pollutant or combination of pollutants which shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and he shall publish a notice for a public hearing on such proposed standard to be held within thirty days. As soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based upon a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

(3) If after a public hearing the Administrator finds that a modification of such proposed standard (or prohibition) is justified, a revised effluent standard (or prohibition) for such pollutant or combination of pollutants shall be promulgated immediately. Such standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case more than one year from the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) (1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

June 30, 1948, c. 758, Title III, § 307, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 856.

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, or 1318 of this title in a permit issued by a State under an approved permit program under section 1342 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

State liability for judgments and expenses

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 859.

§ 1365. Citizen suits—Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation

under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Notice

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; intervention by Administrator

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Litigation costs

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Effluent standard or limitation

(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlaw-

ful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

Citizen

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

Civil action by State Governors

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.
June 30, 1948, c. 758, Title V, § 505, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 888.

§ 1369. Administrative procedure and judicial review

(a) (1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b) (1) (C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence. June 30, 1948, c. 758, Title V, § 509, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 891, and amended Dec. 28, 1973, Pub.L. 93-207, § 1(6), 87 Stat. 906.

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ENVIRONMENTAL PROTECTION AGENCY MEMORANDUM
ON JUDICIAL REVIEW OF EFFLUENT LIMITATIONS GUIDELINES
February 25, 1974

APPENDIX B

MEMORANDUM

To: Acting Assistant ADministrator for Air and Water Programs (AW-443)

From: Assistant Administrator for Enforcement and General Counsel (EG-329)

Subject: Judicial Review of Effluent Limitations Guidelines

The question has been raised by a number of concerned companies regarding whether petitions for judicial review of the 1983 effluent limitations (best available control technology economically achievable) which are presently being promulgated by EPA pursuant to Sections 301 and 304 of the Federal Water Pollution Control Act, as amended (the Act), 33 U.S.C. Sections 1311 and 1314, must be filed within 90 days of the date of promulgation. Section 509(b) of the Act provides that

(b) (1) Review of the Administrator's action ... (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, ... may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

While this will require that an effluent limitation which is not to be implemented until 1983 be judicially reviewed approximately nine years earlier, this clearly is the intent of Congress. The use of the term "any" in Section 509 (b) leaves no doubt that the 1983 limitations are to be reviewed in the same manner as the 1977 limitations and other Section 301 limitations. Therefore, any challenge to a 1983 effluent limitation must be filed within 90 days of the date of promulgation or the party will be precluded from challenging the standard. Section 509 (b) (2) provides that "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement." The validity of such a restriction has been judicially approved in Getty Oil Company (Eastern Operations) v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972), cert. denied, 93 S.Ct. 937 (1973) which involved the similar restriction established in Section 307 of the Clean Air Act.

While Section 509(b) (1) may present some problems in reviewing limitations based in part on estimated and projected information, the Act contains adequate provisions to avoid any harsh results. Most importantly, the 90-day limitation does not apply where the petition for review "is based solely on grounds which arose after such ninetieth day." Thus, an affected party may file for judicial review (or for additional review) at a later date where the basis for the action is facts or other information which became available after the 90 days had passed. For example, a company would be able to obtain judicial review of an effluent limitation after the 90-day period if the estimations or predictions on which it was based do not occur as expected.

Another mitigating factor is that Section 304 (b) requires the Administrator, following promulgation of regulations establishing guidelines for effluent limitations, to "..., at least annually thereafter revise, if appropriate, such regulations." Moreover, Seftion 301 (d) provides that "Any effluent limitation required by paragraph (2) of subsection (b) of this section (the 1983 limitations) shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph." Clearly, Congress has provided for adequate continuing review of the 1983 limitations and any information relevant to determining the necessity for a revision should be surfaced. Thus, any company, or other interested party, has available to it a basis for requesting a revision of a standard where subsequent events appear to justify such revision. A failure or refusal of EPA to do so based on such information would authorize judicial review on the basis of the provision cited in the preceding paragraph. For these reasons, the 90-day requirement in Section 509 (b) does not appear to ba an unreasonable limitation on judicial review of the 1983 effluent limitations.

A final factor which should be mentioned relates to the relationship between Sections 301 and 304. Section 509 (b) makes no mention of judicial review of the Section 304 (b) guidelines for effluent limitations. However, the effluent limitations guidelines which the Agency is presently issuing under Section 304 (b) are also being issued Section 301 and establish effluent limitations under Section 301. Thus, these guidelines fall within the provision in Section 509 (b) for judicial review within 90 days of "any effluent or other limitation under section 301." The effluent limitations guidelines promulgated by the Agency will implement both Section 301 and Section 304. Since it would be impossible to challenge the Section 301 limitations without challenging the Section 304 (b) guidelines, the requirements in Section 509 (b) that limitations promulgated pursuant to Section 301 be challenged in the United States Court of Appeals and within 90 days almost must be considered to include challenges to Section 304 guidelines.

/s/ Alan G. Kirk, II

APPENDIX C

The tabulation of actions outside of Section 509 includes:

(1) Other EPA actions under Section 304. Section 304 is entitled "Information and Guidelines." Not one of the promulgations by EPA is covered by Section 509. Among them are --

(a) Section 304(a). EPA must establish the water quality criteria on which State water quality standards under Section 303 are based. State water quality standards are the alternative to technology for effluent limitations under Section 301(b)(1)(C) and 302.

(b) Section 304(c). EPA must publish information on the means of reducing effluent discharges for the purpose of meeting the new source standards of performance under Section 306. Standards for new plants are covered under Section 509(b), but technological benchmarks for new source standards are not. Section 304(c) serves a function somewhat similar to Section 304(b)'s identification of effluent reductions and the factors to be assessed in determining effluent limitations based on best practicable and best available technology.

(c) Section 304(d). EPA must publish information on "effluent reductions attainable" through the application of secondary treatment by public sewer systems. Secondary treatment is the technological basis for public sewer system "effluent

limitations" under Section 301(b)(1)(B). EPA also must publish information on alternative waste management techniques meeting the criteria of best practicable waste treatment technology. Best practicable technology is the basis for the Section 301(b)(2) standard for public sewers. Section 304(d) is not mentioned in Section 509.

(d) Section 304(e). EPA must publish "(1) guidelines for identifying the nature and extent of nonpoint sources of pollutants and (2) processes, procedures, and methods to control pollution from" agricultural, construction, subsurface-disposal, and other "nonpoint" sources. Such guidelines are not academic studies for use by the States in their discretion. Control of non-point sources is a mandatory part of State plans for area-wide management. Section 208(b)(2)(F) to (I) and (K), 33 U.S.C. §1288 (b)(2)(F) to (I) and (K). Area-wide waste management programs were considered to be among the most important of the 1972 Act. (See H.R. Rep. No. 92-911, 92d Cong., 2d Sess., at 72, 95 (1972).) No discharge permit may be issued contrary to an area-wide plan. (Section 208(e), 33 U.S.C. §1288(e).) Grants for public sewer systems may not be issued except as consistent with an area-wide plan. (Section 208(d).) No less than the technological effluent limitations under Section 301(b), area-wide waste management plans are a key to the Congress' program for clean water and to discharge permits for public sewer systems and industrial sources.

(e) Section 304(f). EPA is required to promulgate pretreatment standards for existing sources. (Section 307(b).) It also must promulgate pretreatment standards for new sources. (Section 307(c).) Both, through the 1973 amendments to the Act, are covered by Section 509(b). But EPA has other obligations with respect to the quality of industrial effluent prior to its introduction into a public sewer system. Under Section 304(f), EPA must publish "guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works." Significantly, these guidelines are for the purpose of "assisting the States in carrying out programs under Section 402" by establishing conditions of NPDES permits for public sewer systems consistent with the Act and the guidelines are to "designate the category or categories of treatment works to which the guidelines apply." There is no suggestion that the provisions of Section 509 apply to the pretreatment guidelines of Section 304(f).

(f) Section 304(g). EPA is required to "promulgate guidelines establishing test procedures for analysis of pollutants." These guidelines are applied in connection with permit applications, are applied as a part of reporting requirements in conditions of issued permits, and are used in enforcement actions.

(g) Section 304(h). EPA must "promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the establishment from owners and operators of point sources" and "promulgate guidelines establishing minimum procedural and other elements of any State program under Section 402." EPA's approval or disapproval of a particular State program is covered by Section 509; the guidelines for State programs are not.

(2) Regulations and Guidelines Governing the Issuance of Permits--

(a) Ocean Discharge Criteria (Section 403). The Act requires EPA to "promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans." Section 403(c)(1), 33 U.S.C. §1343(c)(1). The substantive requirement of salt water protection which these standards implement is parallel and of importance equal to the technological requirements of Section 301(b). Permits under Section 402 into the waters covered by the guidelines may not be issued "except in compliance with such guidelines." Section 403(a), 33 U.S.C. §1343(a).

(b) Guidelines for Disposal of Dredged or Fill Material (Section 404). Authority to issue permits for disposal of dredged or fill intended into navigable water resides with the Corps of Engineers. The designation of disposal sites in such permits must be from "application of guidelines" established by EPA "in con-

junction with" the Corps. Section 404 guidelines for permits are not under Section 509.

(c) Regulations on Disposal of Sewage Sludge (Section 405). An EPA permit must be obtained for the disposal in navigable waters from public treatment systems. Section 405(a), 33 U.S.C. §1345(a). Such permits are to be based on EPA "regulations governing the disposal of sewage sludge." Section 405(b), 33 U.S.C. §1345(b).

(3) Other Guidelines and Regulations. Not all EPA guidelines and regulations provide bases for permits, but many in addition to those in Section 304 have an important regulatory impact.

(a) User Charge Guidelines (Section 204(b)(2)). Assessment of user charges from industrial sewers is a requirement for construction grants and NPDES for public sewer systems. Sections 204(b)(1), 33 U.S.C. §1284 (b)(1); Section 402(b)(9), 33 U.S.C. §1342(b)(9) "Guidelines" issued by EPA govern such charges. Section 204(b)(2), 33 U.S.C. §1284(b)(2).

(b) Guidelines and Regulations for Issuance of Construction Grants (Sections 201(g)(4), 205(a), and 212(2)(c)). Upgrading of public sewage treatment by infusion of Federal funds is a critical aspect of the 1972 Act. Many important standards and conditions for Federal grants and construction are to be established by EPA

regulations and guidelines. Sections 201(g)(4), 33 U.S.C. §1281 (g)(4); 205(a), 33 U.S.C. §1285(a); 212(2)(C), 33 U.S.C. §1292 (2)(C). Neither these regulations and guidelines nor EPA issuance (or refusal to issue) construction grants are within the scope of Section 509.

(c) Aquaculture Guidelines (Section 318). EPA is authorized to permit the discharge of pollutants from aquaculture projects. Section 318(a), 33 U.S.C. §1328(a). To implement that authority, EPA must "by regulation * * * establish any procedures and guidelines [the Administrator] deems necessary." Section 318(a), 33 U.S.C. §1328(a).

(4) Major Regulatory Actions. Further demonstration of the limited scope of Section 509 lies in the fact that it does not cover a large number of important EPA regulatory actions--

(a) Area-Wide Waste Management Plans (Section 208). In addition to the guidelines noted above for the control of non-point sources of pollution in area-wide waste management, the 1972 Act gives EPA authority to issue guidelines and requires approval of various elements of this basic program. Section 208 (a)(1) and (7), (b)(1) and (3), and (c)(2), 33 U.S.C. §1288 (a)(1) and (7), (b)(1) and (3), and (c)(2).

(b) Water Quality Standards (Section 303). State-adopted water quality standards are subject to approval by EPA and, if not approved, such standards must be promulgated by EPA. Similarly, State plans for allocating allowable waste loads among discharges must be presented to EPA with EPA required to promulgate a substitute if it determines that the State allocation does not meet the requirements of the Act. Section 303, 33 U.S.C. §1313. The water quality standards and the allocation implement the requirements of Sections 301(b)(1)(C) and 302 for water-quality based effluent limitations.

(c) Spills of Oil and Hazardous Materials (Section 311). Section 311 authorizes substantial fines and penalties for spills of oil and hazardous materials. Section 311(b)(2)(B) and (b)(5) and (6), as amended, 33 U.S.C. §1321(b)(2)(B) and (b)(5) and (6). EPA is required to develop regulations governing the discharges (spills) for which liability may occur and the magnitude of the liability and requirements applicable to individual plants for prevention of such incidents. Section 311(b)(2), (3), and (4) and (j), 33 U.S.C. §1321(b)(1), (2), and (3) and (j).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent; CELANESE CORPORATION, ET AL., Intervenors.	No. 74-1258

CERTIFICATE OF SERVICE

In accordance with the provisions of Rules 25 and 31 of the Federal Rules of Appellate Procedure, I hereby certify that on this 17th day of June, 1974, two copies of Intervenors' Brief in the above-entitled action were served by U. S. mail, first-class postage prepaid, upon each of the following:

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